

# The Miner.

(Written for the MINER.)

## To Fighting "B" Troop, 8th Cavalry.

BY W. H. R. OR H. F.

Come all you wounded soldiers, who live on pork and beans,  
With plenty of hard work to do, and very slender means,  
Come listen to my story, a song to you I'll sing,  
'Tis of a troop, a gallant troop, that makes the walking ring.

You Arizona heroes, ye men of scolding fame,  
Who hunt Apaches far and near, in Arizona's plain,  
Come, give three cheers for gallant "B," led by bold  
Somerville.

The scowling and dread of red-skinned Imps, and flower of  
civility.

For many years our savage foes have perished, burnt and slain,  
And the best and bravest blood of Arizona's plain;

Then, here's a song for our gallant men, and true,  
Of gallant "B," Eighth Cavalry, the fighting leads in blue.

Here's a health to Sergeant Golding, to Burke and Worth,  
To Daly and O'Callaghan, and all the fighting crew,—  
Not forgetting Little, that veteran mounted true,  
With his leg along behind his back, to wake the boys in blue.

Then, let us fill the goblet, and drink it to the foe,  
And drink a health to heroes, to leading Somerville,

The best that stings in Spring and Fall, and all the year around,  
And thus the blood of red-skins on Arizona's ground.

If all would try, as doth this band, to keep our friends un-  
harmed, our farms, then, might safely be along the roads dis-  
covered.

No weeping maids, no orphan babes to cry to Heaven in  
vain.

But peace and plenty, sure, would reign, for Arizona's  
plain.

No reckless snags, no headless trunks, no smouldering  
fires to show.

Where painted Imps their revels kept, and Christian blood  
did flow.

Where men and women fought, and died, and women  
struck and fell.

A victim to the British will of innumerate heads of bell,  
May Mark, great god of battle, protect you in the field.

Shield you all from harm, and serve your arms with  
might.

Likewise your young commander, long may he live to  
lead.

And win fresh laurels of laurel, a successful warrior's  
meed.

**Territory of Arizona, at the Relation of the  
Attorney-General, vs. Oscar Buckalew,  
Recorder of the County of Pima.**

In the District Court of the First Judicial District.

Opinion of the Court, by Judge Backus.

This is a proceeding in the nature of a *Quo Warranto*, against the Respondent, Oscar Buckalew, as Recorder of the County of Pima. Like

proceedings of this nature at Common Law, its

effect and operation is to try the legal right of the

Respondent to the office in question. The regula-

tions of the Code touching this remedy affect

only the practice, the mode of proceeding, and

the manner of the trial, but do not affect the

substance of the information, and the answer

and the answer instead of the information and

subsequent pleading, as at Common Law, leaving

the law of the case to be settled by the same

rules as to the change of remedy. The only

material change, therefore, affected by the

Code is simply as to the remedy. The mode of

proceeding given by the Code, which is in the

nature of an information, but differing from that

in setting out the whole case of the Relator, to be

met by the answer of the Respondent in the

nature of a plea, admitting, denying or avoiding

the matter set out in the complaint, instead of, as

under the practice at Common Law, making the

full case by the replication and rejoinder. The

issue is now made by the complaint and the

answer, the force and effect of which are to be

settled and determined by the rules prescribed

by the Code. The case was brought on to hearing on

the complaint and answer, without any testimony

on either side. The case, therefore, for the

decision of the Court, arises upon the record and

the law and facts therein exhibited by the pleadings.

The information sets forth, that, by the Organic

Act of the Territory, that the First Legislative

Assembly was, on a census to be taken by the Governor,

to be apportioned by him, and to be elected, at

such time and place, and in such manner, as should

be by him prescribed, but that, thereafter, the

time, place and manner of holding and conduct-

ing all elections by the people, as well as the ap-

portionment of the Representatives in the Legis-

lature, among the several counties and districts,

should be prescribed by law. The complaint fur-

ther sets forth that the First Legislative Assem-

bly of the Territory, by an Act, approved Novem-

ber 10, 1864, purported to delegate to the Governor

the power to apportion the members of the Legis-

lature among the several counties, which, by the

Organic Law aforesaid, was after the First Legis-

lature, to be prescribed by law; that said Legis-

lative act is in direct violation of said Organic

Law of the Territory, and, therefore, void. The

complaint further sets forth and avers that the

Respondent, Oscar Buckalew, holds the office of

Recorder of the County of Pima, and exercises the

functions thereof, under the color of and by virtue of

his pretended election to said office, at an alleged

election held on the first Wednesday of June, 1867,

at a general election held on the first Wednesday

of June, 1867, in accordance with the proclamation

of the Governor, dated at Prescott, May 4, 1867;

that on the first day of July, 1867, he gave a bond,

as required by law, without setting out how or

whereby he was qualified by oath of office or

otherwise, and, finally, by his said answer, he

again denies that he is exercising the office of

Recorder, or using its functions, in violation of

law, but, on the contrary, that he is so doing by

virtue of law. This answer of the Respondent, if

viewed as a pleading at Common Law, is radically

defective both in form and substance, presenting

no triable issue, averring facts directly and

evasively, and also matters of law, without the

facts upon which the law arises, to be determined

by the Court, and not the pleader. If viewed as

an answer, under the Code, it is equally defective.

Without saying anything of its lack of form, it

contains no specific denial of the material allega-

tions of the complaint sought to be controverted

by a general denial of matters of law and

fact combined. According to the rule of

pleading prescribed by the Code, every material

allegation of the complaint, not specifically met

and controverted by the answer, is, for the pur-

poses of the proceeding in which it occurs, an ad-

mission of the truth of all such matters. (Howell

Code, p. 303, § 65.) The answer, therefore, ad-

mitting some allegations, the complaint, naming

the time of the election, the first Wednesday

of June, 1867, and specifically denying none, op-

erates, under the Code, as an admission of what

is alleged in the complaint. What, then, does the

complaint allege as uncontroverted by the answer?

It, in substance, alleges that the Respondent holds

and exercises the functions of the office of

Recorder of the County of Pima, by virtue of a

pretended election at a general election held in that

county on the first Wednesday in June, 1867,

which election was so held on that day, under

color of what purports to be an Act of the Third

Legislative Council of the Territory, convened on

the 3d day of October, 1864, which purported to

change the time of holding the general election of

the Territory from the first Wednesday in Sep-

tember, in each year, as fixed in the Howell

Code, by the First Legislative Council, to the first

Wednesday in June, in each year; that the mem-

bers of both houses of said Legislative Council were

elected from the several counties of the Territory

as they had been apportioned to the said several

counties by the Governor of the Territory; that

the Governor, in making such apportionment,

purported to act under color of an Act of the

First Legislative Council, approved November 10,

1864, purporting to delegate to him such author-

ity; that the Organic Law of the Territory specially

authorized and empowered the Governor to pre-

scribe the apportionment of members to the sev-

eral counties, and the time, place and manner of

their election, for the First Legislative Council,

but expressly providing that, thereafter, the time,

place and manner of holding and conducting all

elections by the people, and the apportionment

of the Representatives to the several counties, in

the Council and House of Representatives, should

be prescribed by law. This state of the case, as

made by the complaint, the answer admits, first,

affirmatively, by expressly stating the election of

the Respondent to be held on the day and at the

place specified in the complaint, and, second, in

effect, by denying the other allegations therein. By

operation of law, therefore, the same are all ad-

mitted, as stated in the complaint. No proof was

taken in the case, and none was necessary, nor,

indeed, was any admissible, the whole case arising

on the record, as made by the pleadings. From

the case, as made by the pleadings, the following

questions present themselves for the consideration

of the Court. 1st. Was the election held at the time

specified in the record a legally valid election? or,

to state the question more clearly, no other ques-

tion being presented by the record as to the val-

idity of said election, except as to the time of its

holding. Was the Act of the Third Legisla-

tive Council, of the 10th of November, 1864, pur-

porting to delegate to the Governor the power to

prescribe the apportionment of members to the

several counties, and the time, place and manner

of their election, for the First Legislative Coun-

cil, a valid act under its provisions? In the

disposition of these questions, raised by the

record, I will first consider the second, for, if that

is answered in the negative, the first is thereby

disposed of as showing the legislative act in ques-

tion invalid and inoperative as law, from the want

of legislative power in the body that purported to

pass it. If it is answered in the affirmative, the

first question remains, and which lies at the very

heart of the case, and which is of the very gravest

importance that has arisen, or ever can arise, touch-

ing the present or prospective condition and hopes of

the Territory. It is, too, one in which the Court

deeply feels its responsibility, for the question is

of no less magnitude than whether any legislative

power now does, or has, or is to be exercised, in

the Territory, and whether that power has not

been lost by the omission or mismanagement

of those having it in charge. Under our form of

government a Territory, unlike a sovereign State,

has no original inherent sovereignty or political

entity. It is a mere creature of the law, a politi-

cal corporation created by Congress, and, in fact, a

Territorial Government is, in its nature, power

and capacity, just like a corporation—a mere

creature of the law that created it, with just such

powers and capacity, and no others, and to be ex-

ercised in the manner and to the extent, and not

otherwise, as pointed out by the law of its crea-

tion. The implied powers of either are limited to

those that are necessary to carry out the powers

expressly given, with the further limita-

tion that, in the exercise of either express or

implied powers, no discretion or variance is allowed

either in the manner or measure of their exercise,

where such manner or measure is defined and

prescribed by the law of their creation. The fol-

lowing cases illustrate these principles: *Good-*

*news vs. Commissioners of Ramsey County*, 11th

*Kansas Rep.*, p. 40. *City of Leavenworth vs. Ran-*

*dom*, 2d *Kansas Rep.*, 375. *People vs. Ulica In-*

*surance Co.*, 10th *Kansas Rep.*, 358. *Halstead vs.*

*Mayor of New York*, 3 *Comstock Rep.*, 430. A

body corporate can only act in the way prescribed

by the law creating it. 2d *Cranch*, U. S. *Rep.*, 166.

*Beatty vs. Marine Ins. Co.*, 2d of *Johnson*, 109.

*Fireman's Ins. Co. vs. Ely*, 2 of *Cowan Rep.*, 673.

*Hoodrick vs. the College of Physicians*, 5th *Wend.*

*Rep.*, 547. *McMasters vs. Reed*, 1st *Grant Rep.*,

26. A State is a corporation.—*State of Indiana*

*vs. Numan*, 6th *Ill. Rep.*, 33. *Dartmouth Col.*

*vs. Woodward*, 4th *Wheat*, 63. Corporate acts

must not only be authorized by the charter, but

those acts must be done by such officers or agents

and in such manner as the charter authorizes.

*Bank of Augusta vs. Earl*, 13 *Peters Rep.*, 387.

Chief Justice Marshall, in his elaborate opinion,

delivered in the case of *Dartmouth College vs.*

*Woodward*, above referred to, defines a corpora-

tion as "an artificial, invisible, intangible being,

existing only in contemplation of law." It

possesses only those powers and properties which

the law of its creation confers upon it, either

expressly or as incidental to its very existence.

These general principles are so well settled and

established, both upon principle and authority, as

rules of action for both private and municipal

corporations, that they have become, almost, legal

axioms. Keeping these principles in view, we

shall be better enabled to consider the main ques-

tion now under consideration.

By the fifth section of the Organic Act the leg-

islative power and authority is vested in the

Legislative Assembly. The arrangement

of the Legislative power, making the Governor,

the creature of and the mere agent of the

General Government, an integral part of the leg-

islative authority, and giving him a dominating

influence over the popular branch, exhibits more

clearly the true legal condition of a Territorial

government, destitute of political sovereignty,

and altogether subordinate to the National Gov-

ernment, and subordinate to the National Leg-

islature. The condition of national legislation—

by not only subjecting its legislation to the un-

controlled discretion of the Governor, the agent

and representative of the Federal Government,

but subjecting all the acts of the entire legisla-

tive power of the Territory to the uncontrolled

discretion of Congress, to be annulled by the

simple dissent of that body. Again, the true legal

condition of the legislative authority of a Ter-

ritory is shown and enforced by the fact that,

by the Organic Law, the legislative power is not,

as in the case of the National Legislature and

the Legislatures of the several States, endow-

ed with the capacity finally to decide upon and

determine as to the qualification and return of

its own members. This question, like every

thing else in the composition of a subordinate